



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of 'the Appeal of)
HERMAN M. AND MARIE A. KARBACHER)

Appearances:

For Appellants: Gordon Watterson
Attorney at Law

John Raber
Public Accountant

For Respondent: Richard C. Creeggan
Counsel

O P I N I O N

This appeal is made pursuant to section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Herman M. and Marie A. Karbacher against a proposed assessment of additional personal income tax in the amount of \$496.54 and a late filing penalty in the amount of \$24.83 for the year 1962.

Appellants are residents of California. In 1959 they acquired 50% of the stock of Tally Cove, Inc., a California corporation engaged in the restaurant business. Tally Cove thereafter acquired a restaurant known

Appeal of Herman M. and Marie A. Karbacher

as the Tally-Ho. As part of the purchase price, Tally Cove executed a \$125,000 note payable to the Tally-Ho's former owner. Appellants were guarantors of this note, as was the owner of the other 50% of Tally Cove's stock.

In 1961 appellants sold their Tally Cove stock to Mr. and Mrs. Herbert. The Herberts were not able to operate the restaurant successfully, however, so in November of 1962 appellants repurchased the stock in order to protect themselves as guarantors of the Tally Cove note. After putting the restaurant back on its feet, appellants again sold their stock in February 1963.

On their joint personal income tax return for 1962 appellants claimed a deduction for a loss in the amount of \$28,558.46 on cash advances made during 1960, 1961, and 1962 to prevent the bankruptcy of Tally Cove. A schedule attached to the return stated that no loans or notes were involved, but asserted that Tally Cove's books would reflect receipt of the advances. After a routine audit of the return, respondent Franchise Tax Board determined that the advances, if made during 1962, constituted either a nondeductible personal loss or additional contributions to capital deductible only to the extent of \$1,000. Accordingly, respondent issued a notice of proposed assessment increasing appellants' taxable income by \$28,558.46 but allowing an additional deduction of \$1,000 for a capital loss.

After appellants filed a protest against the proposed assessment, respondent conducted two separate audits involving appellants' records and the books of Tally Cove. The first auditor determined that Tally Cove's books did not reflect the receipt of or the liability for the alleged advances. Respondent concluded from this audit that the advances, assuming they were in fact made, constituted contributions to Tally Cove's capital. The second auditor determined that the \$1,000 capital loss deduction allowed by the notice of proposed assessment was erroneous because the loss, if any, attributable to the alleged advances was not incurred until the sale of the stock in 1963. No action was taken

Appeal of Herman M. and Marie A. Karbacher

on this finding; however, since the statute of limitations prevented the imposition of more tax than was already asserted by the pending proposed assessment.

Appellants argued to the Franchise Tax Board, as they did before us, that the advances were in the form of direct payment of the expenses of Tally Cove, for the sole purpose of protecting appellants as guarantors of the Tally Cove note. They asserted that the man who purchased their stock in 1963 insisted that the advances not be reflected in Tally Cove's books and that they be absorbed as a personal liability by appellants and be excluded from consideration in determining the purchase price of the stock.

On January 31, 1969, respondent issued a "Notice of Action on Taxpayer's Protest" affirming the previously issued notice of proposed assessment. On February 24, 1969, appellants' representative mailed to respondent a letter which stated, in pertinent part, "On behalf of Herman M. and Marie A. Karbacher I hereby protest your proposed assessment for the taxable year of 1962." Initially, respondent treated this letter as a protest, but when it realized that a protest had already been acted upon, it informed the appellants, by a letter dated March 27, 1969, that its action on their protest had become final because they had not appealed to the Board of Equalization within 30 days from the date the notice of action was mailed. (January 31, 1969). Respondent's letter also stated that appellants' only available remedy was to pay the assessment and file a claim for refund. Thereafter, on April 2, 1969, appellants mailed a letter of appeal to us, stating that their appeal had mistakenly been sent to the Franchise Tax Board and requesting that the time normally allowed to make an appeal be waived.

Respondent has contended throughout the proceedings before us that (1) we lack jurisdiction of this matter because a timely appeal was not filed, and (2) even assuming the existence of jurisdiction, appellants have not established that the advances were ever

Appeal of Herman M. and Marie A. Karbacher

in fact made. After hearing argument on both points, we have concluded that respondent's action in this matter could be sustained on either ground. Obviously, however, we need not reach the merits of the case in view of our conclusion on the jurisdictional question.

Appeals by taxpayers from the action of the Franchise Tax Board on protests against proposed assessments of personal income tax are governed by sections 18593 and 18594 of the Revenue and Taxation Code. Those sections provide as follows:

18593. The Franchise Tax Board's action upon the protest is final upon the expiration of 30 days from the date when it mails notice of its action to the taxpayer, unless within that 30-day period the taxpayer appeals in writing from the action of the Franchise Tax Board to the board.

18594. The appeal shall be addressed and mailed to the State Board of Equalization at Sacramento, California, and a copy of the appeal addressed and mailed at the same time to the Franchise Tax Board at Sacramento, California.

Taken together, these two sections clearly require that an appeal to us from the action of the Franchise Tax Board be addressed and mailed to us in Sacramento^{1/} within 30 days from the date the Franchise Tax Board mails its notice of action on the taxpayer's protest. The 30-day time limit, as well as the procedure to be followed in filing the appeal, were clearly and explicitly stated on the notice of action mailed to appellants. Nevertheless, their representative did not communicate to us an intention to appeal until more than 60 days after the notice of action was mailed.

^{1/} In lieu of mailing the appeal to us, a taxpayer may also deliver the appeal personally to our Sacramento office. (18 Cal. Admin. Code, §5022.)

Appeal of Herman M. and Marie A. Karbacher

Within the 30-day appeal period, the representative did address and mail to the Franchise Tax Board a letter of protest which appellants say was intended as an appeal, but sections 18593 and 18594 plainly require that an appeal be filed with us, not with the Franchise Tax Board. Appellants' appeal, therefore, was filed as of April 2, 1969, and was untimely. Consequently, we lack jurisdiction to determine this matter on the merits. (See Appeal of Shellmar Products Corp., Cal. St. Bd. of Equal., March 10, 1948.)

O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the appeal of Herman M. and Marie A. Karbacher from the action of the Franchise Tax Board on their protest against a proposed assessment of additional personal income tax in the amount of \$496.54 and a late filing penalty in the amount of \$24.83 for the year 1962, be and the same is hereby dismissed for want of jurisdiction.

Done at Sacramento, California, this 27th day of March, 1973, by the State Board of Equalization.

William L. Berry, Chairman
John W. Lynch, Member
Robert H. Allen, Member
John H. Allen, Member
_____, Member

ATTEST: W. W. Dunlop, Secretary